

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

AMO DEVELOPMENT, LLC, )  
AMO MANUFACTURING USA, LLC, )  
and AMO SALES AND SERVICE, )  
INC., )

Plaintiffs, )

v. )

ALCON VISION, LLC, ALCON )  
LABORATORIES, INC., and ALCON )  
RESEARCH, LLC, )

Defendants. )

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ALCON, INC., ALCON RESEARCH, )  
LLC and ALCON VISION, LLC, )

Counterclaim Plaintiffs, )

v. )

AMO DEVELOPMENT, LLC, )  
AMO MANUFACTURING USA, LLC, )  
AMO SALES AND SERVICE, INC. )  
and JOHNSON & JOHNSON )  
SURGICAL VISION, INC., )

Counterclaim Defendants. )

**Redacted - Public Version**

C.A. No. 20-842-CFC-JLH



**ALCON'S RESPONSE TO J&J'S CONCISE STATEMENT OF FACTS  
CONCERNING ALCON'S MOTION FOR SUMMARY JUDGMENT (NO.  
1) THAT THE COPYRIGHT ACT BARS MONETARY RELIEF FOR  
INFRINGEMENT ACTS OCCURRING MORE THAN THREE YEARS  
BEFORE J&J FILED SUIT**

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Dated: October 14, 2022

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Alcon responds to J&J's "Additional Material Facts" (D.I. 421 ¶¶3-17) as set forth below. This response is supported by Alcon's concurrently filed Reply Brief in Support of Its Motion for Summary Judgment (No. 1) ("Reply"), which further sets forth Alcon's explanations and bases for responding to J&J's "facts."

3. Undisputed but immaterial.

4. Disputed based on the statements that "J&J had no access to" the described FDA submissions prior to discovery and "had no way of knowing about" those submissions. J&J suggested it could have obtained access through a FOIA request, J&J's Ex. 6 at 157:22-158:8, and Alcon's witness testified that [REDACTED] *id.* 160:10-12; *see* J&J's Ex. 16 at 86:12-19. Furthermore, had J&J filed suit sooner, it could have obtained access through discovery sooner. *See* Reply 8. The remaining materials J&J cites are its own pleadings and expert reports, which are disputed. However, these "facts" are immaterial to the statute of limitations issue. *See id.*

5. Undisputed except as to the overgeneralized statement that object code contains "very limited instances of human-readable text" and to the extent the statement implies that object code cannot be analyzed by humans. Alcon's expert will testify that "it is not true that object code is impossible to analyze." A3075-80, Wicker Op. Rpt. ¶116; *see id.* ¶¶117-33. However, these "facts" are immaterial to the statute of limitations issue. *See* Reply 3-7.

6. Undisputed that in 2014, [REDACTED], J&J personnel inspected a LenSx machine. The rest is disputed to the extent J&J suggests it could not have determined source code copying from viewing object code. J&J discovered [REDACTED] [REDACTED]. *See* A4958-5042, Pls.’ 6th Suppl. Resp. to Interrog. No. 5. However, these “facts” are immaterial to the statute of limitations issue. *See* Reply 3-7.

7. Disputed but immaterial. Whether J&J “noticed similarities” concerning only iFS “declaring” code is both disputed and immaterial to the statute of limitations issue. *See* Reply 3-7.

8. Disputed but immaterial. What inspecting the LenSx object code “could reveal” is both disputed and immaterial to the statute of limitations issue. *See* Reply 3-7.

9. Disputed but immaterial. What J&J “could know” about implementing code copying is both disputed and immaterial to the statute of limitations issue. *See* Reply 3-7. Whether “Alcon ... stole[]” implementing code involves disputed legal issues.

10. Disputed but immaterial. What J&J “could know” about implementing code copying is both disputed and immaterial to the statute of limitations issue. Whether “laser cutting” is “the central functionality that gives the machine its value”

involves disputed factual and legal issues, but it is immaterial to the statute of limitations issue. *See* Reply 5-7.

11. Disputed because J&J cites three of its own expert reports for the proposition that “the parties’ experts agree.” In addition, it cites one portion of a deposition of Alcon’s expert Dr. Wicker stating that [REDACTED]

[REDACTED] but *not* stating the blanket proposition that [REDACTED]

[REDACTED] J&J’s Ex. 11 at 235:25-236:2. Though J&J mischaracterizes Dr. Wicker’s testimony, the mischaracterization is immaterial to the statute of limitations issue. *See* Reply 3-7.

12. Disputed but immaterial. In the testimony attached as J&J’s Exhibit 13 and 14, Alcon’s witnesses did not state that it would be “impossible” to confirm LenSx source code was based on the iFS software without comparing the two source code bases. However, these “facts” are immaterial to the statute of limitations issue. *See* Reply 3-7.

13. Undisputed that reverse compilation is a challenging, resource-intensive process. The rest is disputed due to mischaracterization but is immaterial. J&J cites only its own expert reports for the proposition that reverse compilation “rarely (if ever) results in a complete picture of the underlying source code,” and Alcon disputes that statement to the extent it implies that reverse compilation cannot

provide evidence of source code copying. However, the mischaracterization is immaterial to the statute of limitations issue. *See* Reply 3-7 .

14. Undisputed, except as to the mischaracterization of Dr. Wicker's testimony as "speculating." However, the mischaracterization is immaterial to the statute of limitations issue.

15. Disputed because the cited portion of Dr. Feigal's report (J&J's Exhibit 15) does not state that documentation included in 510(k) submissions "could be drafted in multiple different manners." The remaining materials J&J cites for the "facts" in this paragraph are its own expert reports, which are disputed. However, these "facts" are immaterial to the statute of limitations issue. *See* Reply 8.

16. Undisputed but immaterial.

17. Undisputed that Mr. Hudnall agreed that [REDACTED]  
[REDACTED] in the letter cited as J&J's Exhibit 38 and testified  
that [REDACTED]

[REDACTED] The rest is disputed to the extent J&J characterizes Mr. Hudnall's testimony. However, J&J's characterization of J&J's Exhibits 38 and 39 is immaterial to the statute of limitations issue. *See* Reply 7.

Respectfully,

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**WORD COUNT CERTIFICATION**

The undersigned counsel hereby certifies that Alcon's Response to J&J's Concise Statement of Facts Concerning Alcon's Motion for Summary Judgment (No. 1) contains 868 words excluding the cover page, tables and signature blocks, as counted by Microsoft Word, in 14-point Times New Roman font.

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**CERTIFICATE OF SERVICE**

I, Andrew E. Russell, hereby certify that on October 14, 2022, this document was served on the persons listed below in the manner indicated:

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